

(1966) 02 CAL CK 0020

In the Calcutta High Court

Case No : Appeal from Original Order No. 21 of 1963

R.C. Chakravarty

APPELLANT

Vs

Divisional Superintendent, Eastern Railway

RESPONDENT

Date of Decision : 08-02-1966

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1968) 1 ILR (Cal) 338

Hon'ble Judges : Bose, C.J.;B.C. Mitra, J

Bench : Division Bench

Advocate : Noni Coomar Chakravorty and Nepal Chandra Sen, for the Appellant;Subimal Roy, Bhabesh Narayan Bose and S.K. Guha, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Mitra, J.—This appeal is directed against a judgment and order of Banerjee, J. dated September 5, 1962, whereby a rule nisi obtained by the Appellant on a petition under Article 226 of the Constitution was discharged.

2. The Appellant held a permanent post in the Eastern Railway as Divisional Personal Inspector. The appointment was made by the Deputy General Manager (Personnel) of the East Indian Railway which later came to be known as the Eastern Railway. On July 11, 1960, the Appellant was arrested under the orders of the District Magistrate, Howrah, and was detained in the Dum Dum Central Jail from July 11, 1960 to July 22, 1960, when he was released under the orders of the Government of West Bengal. On July, 14, 1960, an order was issued on the signature of the Divisional Superintendent, Howrah, whereby 42 employees (including the Appellant) of the Eastern Railway, who were alleged to be on illegal strike, were placed under suspension with immediate effect. On July 26, 1960, another letter was addressed by the Divisional Superintendent, Howrah, to the Appellant whereby the latter was informed that he was put on suspension with effect from July 14, 1960. The Appellant was also informed by this letter

that during the period of suspension he would draw subsistence allowance on half average pay and other usual allowances. It is alleged in the petition that by the said letter dated July 26, 1960, a suspension order was made with retrospective effect from July 14, 1960, on which date the Appellant was under preventive detention. On September 7, 1960, an office order was issued by the Divisional Superintendent, Howrah, whereby it was provided that as the Appellant was detained under Preventive Detention Act with effect from July 12, 1960, he should be considered as under suspension with effect from the same date in terms of para. III of appendix XXXI to the Indian Railway Establishment Code, vol. II. It was further provided in this order that the said office order made on July 14, 1960, placing the Appellant and 41 employees under suspension, should be deemed to have effect immediately on the Appellant's release from detention.

3. It is alleged in the petition that by reason of the Appellant's preventive detention, he was deemed to be under suspension for the period from July 12, 1960 to July 22, 1960, in accordance with the Rules contained in para. III of appendix XXXI to the Indian Railway Establishment Code, vol. II.

4. The Appellant's contention is that the order of suspension dated July 14, 1960, is bad so far as the Appellant is concerned inasmuch as the condition of the order of suspension was that the employees who were suspended were on illegal strike, but this condition could not in any event apply to the Appellant as he was under preventive detention and not on strike as wrongly alleged.

5. While under detention in jail the Appellant wrote to the Respondent No. 1 about his detention and after his release from the detention he again wrote two letters to the Respondent No. 1, asking the latter to allow the Appellant to resume his duties. Later on, on September 1, 1960, the Appellant made a further representation to the Respondent No. 1, but the Appellant obtained no relief on these representations. Thereafter the Appellant moved this Court under Article 226 of the Constitution and obtained a Rule Nisi which was discharged by the judgment and order hereinbefore mentioned. This appeal is directed against the said order discharging the Rule.

6. Mr. Noni Coomar Chakravorty, learned Advocate for the Appellant, contended that there were three orders of suspension made on July 14, 1960, July 26, 1960 and September 7, 1960, and all these orders were passed by the Divisional Superintendent, Howrah. The Appellant was appointed by the Deputy General Manager (Personnel) who, it was submitted, was an officer superior to the Divisional Superintendent and, therefore, the order of suspension was bad. It was argued that the Divisional Superintendent, Howrah, had no authority to pass any of the suspension orders with regard to the Appellant who was appointed by the Deputy General Manager (Personnel) who held a rank higher than that of the Divisional Superintendent. Mr. Chakravorty argued that the orders of suspension were passed by the Divisional Superintendent, Howrah, without authority and were, therefore, a nullity and must be struck down.

7. Mr. Subimal C. Roy, learned Counsel for the Respondents, however, contended that there was no substance in the first contention raised by the Appellant. The Appellant was appointed in the Railway service in 1942 when the Deputy General Manager (Personnel) held the rank of a junior administrative officer, and the Divisional Superintendent ranked and has always ranked as an intermediate administrative officer and, therefore, higher in rank than that of the Deputy General Manager (Personnel). In support of this contention Mr. Roy invited our attention to the classified list of Gazetted Establishment of Indian Railways published in 1960. At pp. 17-21 of this list are set out the seniority and gradation list of various Railway officers. At p. 18 of this list the Divisional Superintendent is shown as an intermediate administrative officer holding a superior post to the Deputy General Manager (Personnel) who is shown as a junior administrative officer. Referring to this gradation list Mr. Roy argued that there could be no doubt that the Divisional Superintendent who passed the suspension order was a senior and superior officer, who held a higher rank than a Deputy General Manager (Personnel).

8. Mr. Roy, however, raised another objection which in our view is still more substantial. He argued that the allegation regarding the Divisional Superintendent's holding an inferior rank and status to that of the Deputy General Manager (Personnel) was to be found in para. 14B of the petition which has been verified as a submission. It was, therefore, argued that there was no allegation of fact in the petition that the Divisional Superintendent could not make the order of suspension as he held a rank which was inferior to that of the Deputy General Manager (Personnel). It was also argued that this contention of the Appellant was a mere submission to this Court and the Respondents are, therefore, not called upon to answer this contention.

9. In our opinion Mr. Roy's submission on this aspect of the Appellant's case are sound. Mere submission by a Petitioner in a petition cannot be treated as evidence which the Respondents are called upon to traverse or controvert. But quite apart from this objection, which in our view is fatal, it appears that the Divisional Superintendent in fact held a senior and higher post than the post held by a Deputy General Manager (Personnel). There is, therefore, no substance in this contention of Mr. Chakraborty and it is accordingly rejected.

10. The contention of Mr. Chakraborty was that Rule 1711 of the Discipline and Appeal Rules for non-gazetted staff dealt with the question of suspension. Under Sub-rule (i) of this rule the appointing authority or a higher authority or any other authority empowered by this Rule may place a Railway servant under suspension if any enquiry into his conduct is contemplated or is pending or if a complaint against him of any criminal offence has been made and is under investigation. It was argued that the suspension order could not be justified under Sub-rule (i) as it was not purported to be made on any of the grounds specified thereunder. Under Sub-rule (ii) of this Rule a Railway servant who is detained in custody whether on a criminal charge or otherwise for longer than 48

hours shall be deemed to have been suspended by the appointing authority under this Rule. Mr. Chakraborty argued that the suspension could be justified, if at all, under Sub-rule (ii) but this sub-rule could not be attracted or invoked as the suspension order contemplated by this sub-rule was to be made by the appointing authority. But as the suspension order in the case of the Appellant was not made by the appointing authority but by different officers, Sub-rule (ii) could not be invoked in the case of the Appellant. In this case, it was argued, the Appellant could not be deemed to have been suspended by the appointing authority as he had produced evidence to show that the order of suspension was made by a Divisional Superintendent who was not the appointing authority in the case of the Appellant. That being so, it was argued, the orders of suspension could not be sustained on the terms of Sub-rule (ii) of Rule 1711.

11. It was next contended by Mr. Chakraborty that the Respondents sought to uphold and support the suspension orders on the strength of the provision in para. III of appendix XXXI to the Indian Railway Establishment Code, vol. II. It was argued that the terms of para. III provided that when a Railway servant was detained under any law providing for preventive detention, he should be considered as under suspension for any period during which he was detained in custody until the termination of the proceedings against him or until he was released from detention and allowed to rejoin his duties, as the case might be. It was further argued that the first order of detention made on July 14, 1960, was not purported to be made under the terms of the said para. III. On the other hand, it was stated that the suspension order was made against the employees on the ground that they were on illegal strike with effect from July 12, 1960. Therefore, Mr. Chakraborty argued that the suspension order could not be upheld because it was not purported to be made under the provision of the said para. III. Turning to the second order made on July 26, 1960, Mr. Chakraborty argued that there was nothing in this order also to warrant a conclusion that the order of suspension was made by reason of the preventive detention of the Appellant. Furthermore, it was argued that the said second order dated July 26, 1960, was in any event bad as it suspended the Appellant with retrospective effect from July 14, 1960, and such an order in any event was unlawful. The validity of the third order made on September 7, 1960, was attacked firstly on the ground that the order was made by the Divisional Superintendent who was not the appointing authority and secondly on the ground that it sought to retrospectively suspend the Appellant and was, therefore, unlawful.

12. Banerjee, J., dealing with this aspect of the contention of the Appellant, held that the real suspension order was the order made on July 14, 1960, and this order could not be criticised on the ground that it was seeking to give retrospective operation to a suspension order. It was also held that this order could be made effective after the release of the Appellant from detention, that is, July 22, 1960, and that the fact that the same thing was sought to be done by the order dated September 7, 1960, did not make any material difference. Learned Counsel for the Respondents supported the conclusion of the trial Court

on the ground that the effect of the said para. III of the appendix XXXI to the Indian Railway Establishment Code, vol. II, was that whenever a Railway employee was detained under any law providing for preventive detention, he was to be considered as under suspension for the period of detention and also until he was allowed to rejoin his duties. Therefore, Mr. Roy argued that apart from the operation of the said orders of suspension, the Appellant was to remain on suspension by reason of operation of the said Rule. Therefore, it was argued that even assuming that the orders of suspension were bad, the Appellant would still remain validly suspended by reason of the terms of the said para. III of appendix XXXI. It was next argued by Mr. Roy that the order dated September 7, 1960, made it quite plain that the Appellant was to be considered as under suspension under the terms of para. III of appendix XXXI. Therefore, the Divisional Superintendent was invoking the terms of para. III of the said appendix in the case of the Appellant.

13. In our opinion this contention of Mr. Roy appears to be well-founded, even if no order of suspension was in fact made by the Divisional Superintendent, the Appellant would remain suspended by reason of operation of the Rule in para. III of appendix XXXI to the Indian Railway Establishment Code, vol. II. Furthermore, such suspension would continue until he was allowed to rejoin his duties. The suspension order cannot in our opinion be set aside, nor can the Appellant be allowed to resume his duties having regard to the terms of the said para. III.

14. It was next contended by Mr. Roy that note 2 to Rule 1711 of the Discipline and Appeal Rules for non-gazetted staff clearly provided for an appeal where an order of suspension was made against a Railway employee under Rule 1711. There was, therefore, it was argued, an alternative remedy provided by the Rule and it was open to the Appellant to take recourse to an alternative remedy, but instead of taking recourse to the alternative remedy which the Rule provided the Appellant had come to this Court under Article 226 of the Constitution. Mr. Roy, therefore, argued that in the fate of this case there was no reason why the Appellant should not have taken recourse to the alternative remedy provided by the Rules. In our opinion this contention of Mr. Roy is also well-founded. It is true that an alternative remedy by itself does not take away the jurisdiction of this Court to issue appropriate writ and order under Article 226 of the Constitution. But it is now well-settled that, where there is provision for alternative remedy, the Court should be slow to make any order in exercise of its extraordinary jurisdiction under Article 226 of the Constitution. In this case the Appellant has furnished no explanation for not taking recourse to the alternative remedy for which provision has been made in the Rule.

15. There remains only one other contention of Mr. Chakraborty to be disposed of, namely, that Sub-rule (ii) of Rule 1711 could not be invoked as the suspension order contemplated by that sub-rule should be made by the appointing authority and by nobody else. It is to be noticed, however, that under Sub-rule (ii) of Rule 1711 when a Railway servant is detained in custody on a

criminal charge or otherwise he should be deemed to have been suspended by the appointing authority under this Rule. Therefore, even if an order of suspension is not made, it is to be deemed that he has been suspended by the appointing authority. It is thus clear that whether an order of suspension has in fact been made or not or whether such an order of suspension has been made by the appointing authority or by some other authority, the effect of Sub-rule (ii) is that it is to be deemed that such an order has been made by the appointing authority. That being so, in our opinion there is no force in Mr. Chakraborty's contention that Sub-rule (ii) cannot be invoked as the order of suspension was not made by the Deputy General Manager (Personnel) but by the Divisional Superintendent, Howrah.

16. Before concluding, however, I should mention that Mr. Chakraborty argued that the three orders made on July 14, 1960, July 26, 1960 and September 7, 1960, are separate and independent orders and they should be treated as such and treating them as such it was to be seen if the orders could be held to be valid. He argued that the order made on July 14, 1960, could not apply to the Appellant as that order was made with regard to the employees who were on strike and the Appellant was not on strike as he was detained in jail from July 11, 1960. With regard to the order dated July 26, 1960, it was argued that this order was bad as the Appellant was sought to be suspended with retrospective effect from July 14, 1960. The third order dated September 7, 1960, it was argued, was bad, firstly because it was not made by the appointing authority, but by the Divisional Superintendent, Howrah, and secondly because this order was retrospective in its effect as the Appellant was sought to be suspended from July 12, 1960.

17. Mr. Subimal Roy repelled the above contention of Mr. Chakraborty by submitting that there was only one order of suspension, namely, the order dated July 14, 1960. The second order made on July 26, 1960, it was argued, was nothing more than a specific communication to the Appellant of the general order made on July 14, 1960. The third order dated September 7, 1960, Mr. Roy argued, was also not an order of suspension but was a clarification of the first order made on July 14, 1960, although its effect was partial supersession of the first order made on July 14, 1960, and also of the second order made on July 26, 1960.

18. In our opinion Mr. Roy's contentions are well-founded. Upon a careful consideration of the said three orders, it is clear to us that there was only one order of suspension, namely, the order made on July 14, 1960, and the two orders subsequently made on July 26, 1960 and September 7, 1960, cannot and should not be treated as independent orders of suspension. The order made on July 26, 1960, was quite clearly intended to inform the Appellant about the suspension with effect from July 14, 1960, and the order made on September 7, 1960, was nothing more than a clarification and the partial modification of the two earlier orders.

19. In our opinion, Banerjee, J. was right in discharging the Rule. For the reasons mentioned above this appeal fails and is accordingly dismissed, each party to pay its own costs.

Bose, C.J.

20. I agree.